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Restructuring the Canadian Senate through Elections

Bruce M. Hicks
and André Blais

Strengthening Canadian Democracy

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Strengthening Canadian Democracy / Renforcer la démocratie canadienne

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Geneviève Bouchard

Since the 1960s, increased levels of education and changing social values have prompted calls for increased democratic participation, both in Canada and internationally. Some modest reforms have been implemented in this country, but for the most part the avenues provided for public participation lag behind the demand. The Strengthening Canadian Democracy research program explores some of the democratic lacunae in Canada's political system. In proposing reforms, the focus is on how the legitimacy of our system of government can be strengthened before disengagement from politics and public alienation accelerate unduly.

Depuis les années 1960, le relèvement du niveau d'éducation et l'évolution des valeurs sociales ont suscité au Canada comme ailleurs des appels en faveur d'une participation démocratique élargie. Si quelques modestes réformes ont été mises en œuvre dans notre pays, les mesures envisagées pour étendre cette participation restent largement insuffisantes au regard de la demande exprimée. Ce programme de recherche examine certaines des lacunes démocratiques du système canadien et propose des réformes qui amélioreraient la participation publique, s'intéressant par le fait même aux moyens d'affermir la légitimité de notre système de gouvernement pour contrer le désengagement de plus en plus marqué de la population vis-à-vis de la politique.

Strengthening Canadian Democracy / *Renforcer la démocratie canadienne*

Contents

2 Introduction
3 Lessons from Other Countries
10 The Harper Government's Senate Reform Proposals
16 Conclusion
17 Notes
19 References
21 Résumé
22 Summary

Restructuring the Canadian Senate through Elections

Bruce M. Hicks and André Blais

Introduction

Shortly after the 2006 election, at an IRPP working lunch on the reform of democratic institutions held on May 8, 2006, Senator Hugh Segal, the moderator of the discussion, informed the audience that the new Conservative government would shortly be unveiling an initiative to reform the Canadian Senate. He did not offer details, other than to say that it would be designed to avoid the dreaded constitutional negotiations that for the previous two decades had ended only in acrimony, disappointment and additional fissures in the constitutional fabric.

Four weeks later, in the Senate of Canada, the first of two pieces of legislation was introduced: *An Act to Amend the Constitution Act, 1867 (Senate Tenure).* This bill proposed amending the Constitution by the federal Parliament alone so as to reduce senators' terms to eight years from the current appointment until age 75. Then, on December 13, 2006, the government tabled in the House of Commons *An Act to Provide for Consultations with Electors on Their Preferences for Appointments to the Senate (Senate Appointment Consultations Act).* This second bill, a simple Act of Parliament, would have authorized the federal cabinet to order the chief electoral officer (or, alternatively, provincial chief electoral officers) to hold elections in any province or territory to determine who should be appointed to the Senate. Though these elections were purported to be simply consultative, and justified as a temporary measure until proper Senate reform through constitutional means could be undertaken, the effect would have been to ensure that in the future all senators would be elected in province-wide elections through a form of proportional representation known as single transferable voting (STV).

IRPP Choices, Vol. 14, no. 15, November 2008

The government prorogued Parliament on September 14, 2007, and both bills died on the order paper. But both were reintroduced one month later and numbered C-19 (*Senate Tenure*) and C-20 (*Senate Appointment Consultations Act*). When a federal election was called for October 14, 2008, the advance of these bills was halted again. However, the Harper government has said it will reintroduce both of these pieces of legislation when Parliament resumes.

These are significant pieces of legislation for two important reasons. First, they propose changing the Senate from an appointed body to an elected body without holding federal-provincial negotiations and obtaining provincial legislative concurrence. Second, the federal government is recommending for the first time a form of proportional representation, a departure from every previous government's Senate reform proposals and also from every federal government position on parliamentary elections in the modern era.

This proposal is therefore deserving of great attention by Canadians. Yet, to date, it has drawn scant interest from the media. This is perhaps not entirely surprising, as the Canadian Senate is generally ignored. It is not seen as a politically relevant body, and research about it is usually limited to the single perspective of what this chamber was designed to offer, what it can offer and what it has offered to a parliament based on the Westminster model of responsible parliamentary government.

Yet the very fact that a federal government placed these two pieces of legislation before Parliament calls for a broader analytical perspective. The constitutional implications alone necessitate a proper understanding of whether changes that purported to be nothing more than ordinary legislation designed to permit public input into prime-ministerial appointments could materially affect the balance of power within Parliament (or between levels of government). In short, can structural change be achieved through election rules?[1]

To partially answer this question, the evidence from other countries with respect to bicameralism will be reviewed, in terms of both the configuration of second chambers generally and electoral systems specifically, in the first part of this study. This perspective is essential since there is, at least in our current understanding, no instructive theory on bicameralism that recommends a particular organizational structure.

The second part of this study will focus on the Canadian Senate and the specific proposal advanced by the Harper government in the 39th Parliament. As noted, this proposal was billed as simply a temporary measure to permit the prime minister to obtain public input into his appointments. However, the legislation provided detailed rules for holding elections under STV. This proposed system and its implications need to be properly understood. After all, electoral systems, on one level, reflect a society's values by determining the rules by which citizens choose their representatives in a democracy.

It is noteworthy that in each province where some form of proportional representation has been considered, the principle has been that any change to the method of selecting legislators must have the widest possible public consultation, and a number of provinces have therefore conducted citizens' forums and referendums.[2] Yet the Harper government's approach to these two bills, one of which would actually have changed the Canadian Constitution even if it only required passage through Parliament, was that they should be treated no differently than ordinary pieces of legislation.

Lessons from Other Countries

Senates, and bicameralism[3] more generally, are insufficiently studied by academics and largely ignored by political elites, particularly in comparison to lower chambers, like the House of Commons. The German Bundesrat, which was the idealized model for many of the Canadian Senate reform proposals advanced in the early part of Canada's patriation round of constitutional negotiations in the late 1970s and early 1980s, has not been "adequately examined in parliamentary research," even in Germany (Thaysen and Davidson 1990, 7). Patterson notes that the United States Senate, which is arguably the most powerful upper chamber in the world and has been the model for many Latin American senates, "was largely neglected by political scientists until the 1980s," and the British House of Lords, which was the template for bicameralism in general, "attracted little scholarly attention until the 1990s" (Patterson 1999, x).

To further complicate our understanding of upper chambers, the approach to scholarship varies by country. Countries with unitary systems of government, particularly countries with unelected upper chambers, appear to generate interest only in the deficiencies of their upper chambers; while in countries that have influential upper chambers – that is, countries that have elected chambers or are federal – the focus is on conflict and power distribution between the two cham-

bers (Tsebelis and Money 1997).[4] Although Canada is a federal country, the role of the unelected Senate in servicing federalism by advocating on behalf of provincial, particularly governmental, interests has always been doubtful (Watts 1996, 2003; Russell 2000; Smith 2003; Forsey 1982), so scholarship tends to be similar to that of unitary countries.

This dearth of scholarship means that bicameralism is "under-researched and under-theorized" (Uhr 2006, 474) and is, at least in the current literature, "a concept in search of a theory" (Shell 2003). That doesn't mean that no one has tried to theorize about bicameralism; it only means that no comprehensive theory that might be useful to our purposes exists. In fact, Patterson and Mughan (1999), Tsebelis and Money (1997), Lees-Smith (1923), Marriott (1910) and Temperley (1910) have each tried to identify a theory of bicameralism through comparative analysis combined with an examination of the theoretical works of the early Greek political philosophers who advocated "mixed government" and the seventeenth- and eighteenth-century theorists who gave the world the theory of federalism. However, their conclusions are little more than a recognition that upper chambers tend to perform the dual function of *representation* and *review* (Hicks 2007, 22). While not an overly useful theory for understanding how Canada should structure its second chamber, it does provide a useful framework for comparing legislative chambers across polities. (For ways of classifying bicameral legislatures see Lijphart 1984; Mastias and Grangé 1987.)

Representation

The alternative mechanism that an upper chamber provides for representation in diverse societies may explain the general attraction of bicameralism and its particular appeal for federal countries. Unitary countries are fairly evenly divided between unicameral and bicameral legislatures (Lijphart 1999, 202), though "two-thirds of *democratic* national legislatures are bicameral" (Uhr 2006, 477 [emphasis in original]). And while federal countries account for only one-third of bicameral systems in the world (Patterson and Mughan 1999, 10), the "model of bicameral federalism spread so widely that today virtually all federal countries have bicameral legislatures"[5] (Tsebelis and Money 1997, 6). The only strictly foundational principle for an upper chamber evident from comparative analysis is that there must be structural differences in representation between the two houses (Russell 2000).

The most common structure for representation in an upper chamber is geographic. Even in historical appointed chambers where membership was based on the "estates," representation was geographic in that members of the aristocracy had originally been given areas of the country to administer as feudal lords, and the spiritual lords also had their regions – the bishops' sees or dioceses. The relationship between representation and geography is more pronounced in federations, as it is usually by territorial boundaries that the subadministrative units are established (though the units themselves may reflect distinct cultural or ethnic groupings).

Table 1 lists the 24 countries that currently operate under federalism. It is noteworthy that all but five of the world's federations also employ bicameralism, particularly given that federalism is itself based on competition between divided levels of government. In all these federal bicameral legislatures, representation in the upper chamber at the federal level is tied in some way to the lower level's administrative units, either by using the same geographic boundaries for direct election or appointment, or by permitting indirect election by the administrative unit.

It is also significant that even in federal countries where the second house represents regions, provinces or states, and the first house represents overall population, the exact number of seats assigned to each geographic unit within the upper chamber varies dramatically by country and is not usually based on equality or population, but is determined by some formula midway between the two.[6]

The most common method of selecting representation in the upper house is through direct election. Countries with direct election of the entire upper chamber are Australia, Bolivia, Brazil, Colombia, Czech Republic, Dominican Republic, Haiti, Japan, Kyrgyzstan, Mexico, Palau, Paraguay, Poland, Romania, Switzerland and the United States. In a number of other countries, the core representation of the upper chamber is directly elected and then supplemented by indirectly elected or appointed members. Indirect election is half as common as direct election, with most indirect elections conducted by local or provincial legislatures or, as in the case of France, local electoral colleges. Almost a third of the upper chambers are appointed, including those of Germany, where appointments are by the provincial or Land governments, and former and current British colonies like the Bahamas, Barbados, Canada, Grenada, Jamaica and Saint Lucia, where appointments are made by the governors general.

Table 1
Countries with Federal Systems

Country	System	Constitution	Legislature	Levels	Administrative units
Argentina	republic	1853[1]	bicameral	2	23 provinces, 1 district
Australia	parliamentary	1901	bicameral	2	6 states, 2 territories
Austria	republic	1945	bicameral	2	9 provinces (Länder)
Belgium	parliamentary	1993	bicameral	3[2]	10 provinces, 3 regions
Bosnia and Herzegovina	republic	1995	bicameral	2	2 federations,[3] 1 district
Brazil	parliamentary	1988	bicameral	2	26 states, 1 district
Canada	parliamentary	1867	bicameral	2	10 provinces, 3 territories
Comoros	republic	2001	unicameral	2	3 islands
Ethiopia	republic	1995	bicameral	2	9 states, 3 2 administrations
Germany	republic	1949[4]	bicameral	2	16 provinces (Länder)
India	republic	1950[1]	bicameral	2	28 states, 7 territories
Malaysia	parliamentary	1963	bicameral	2	13 states, 1 territory
Mexico	republic	1917	bicameral	2	31 states, 1 district
Micronesia	republic	1979	unicameral	2	4 states
Nigeria	republic	1999	bicameral	2	36 states, 1 territory
Pakistan	republic	2003[5]	bicameral	2	4 states, tribal areas,[3] district
Russia	republic	1993	bicameral	2	89 oblasts, republics, okrugs, krays, districts
St. Kitts and Nevis	parliamentary	1983	unicameral	2	14 parishes
South Africa	republic	1997	bicameral	2	9 provinces
Spain	parliamentary	1978	bicameral	2	17 communities, 2 districts
Switzerland	republic	1874	bicameral	2	20 cantons, 6 half-cantons
United Arab Emirates	federation	1971	unicameral	2	7 emirates
United States of America	republic	1789	bicameral	2	51 states, 1 district
Venezuela	republic	1999	unicameral	2	23 states, 1 district

Source: Based on Forum of Federations (2007); Central Intelligence Agency (2008).
[1] Revised frequently beginning in the 1960s.
[2] Three levels of governance: federal, regional and linguistic.
[3] Ethnically based.
[4] Basic Law became the constitution of united Germany in 1990.
[5] Established in 1973 but suspended twice due to military coups, then reinstated with amendments.

Whom a representative is to represent is of course disputed, with Madison famously arguing in 1787 that representatives are delegated authority from the citizenry (see Rossiter 1961), and Burke in 1790 suggesting that all members of a legislature cease being local representatives and become members of the national parliament (Burke, in Turner 2003). As societal diversity has come to be acknowledged, the concepts of representation have also evolved, with Pitkin arguing that representation is variously formal, descriptive, symbolic and substantive (1967).

There is no shortage of research on the nature of representation that is achieved by elected officials in lower chambers. While there is less systematic research on representation in upper chambers, it is possible to generalize that in countries where members of the upper chamber are elected directly by the population or indirectly by the provincial legislatures, they generally provide substantive representation for the citizenry, and any minority representatives chosen in this manner furnish the strongest symbolic representation.[7] Where senators are appointed by the provincial governments, they are likely to provide direct representation for the provincial government. And in instances of appointment by the central government, they are likely to represent the country's interests more than regional interests.

Review

It has been argued that when looked at comparatively, regional representation is not necessarily required and that review is therefore the more important of the two functions (Brennan and Lomasky 1993, 214). This is a misconception since it is rare that representation in both chambers is based on the same principle. Even where a similar mechanism for selection has been used for both chambers, the differences in size between the chambers,[8] combined with the different terms or dates of selection and the variable opinion of voters, will always ensure that the representation principles in the two chambers will be different (Tsebelis and Money 1997, 53-4).[9]

Lijphart argues that for a country to have a strong upper chamber, it must have different representation in the second chamber, similar constitutional authority to veto legislation and the public legitimacy to exercise that authority (1999, 200). Upper chambers with elected members tend to have power coequal to that of their lower houses, whereas appointed or hereditary houses are often restricted in their legislative powers (Tsebelis and Money

1997, 45). Even where coequal constitutional powers are given to an unelected upper chamber, public legitimacy to use those powers is often lacking. Temperley observed this trend a century ago when he wrote, "Power seems to be enjoyed by the Upper Chamber in proportion as its composition is democratized" (1910, 62). Today, however, we know that appointed upper chambers in federations where representation is on behalf of administrative units have more legitimacy than those where appointment is exclusively the purview of the federal government or is based on the historic claims of a social class (Mastias and Grangé 1987).

It must be stressed that bicameralism "appears to have little effect on the relationship between the legislature and the executive" (Tsebelis and Money 1997, 1), and that the second chamber is about legislation, not governance. This is as true for republics, where the president is elected separately, as it is for parliamentary systems, where even though the government requires the support of Parliament, this support is always delivered through the popularly elected lower house. Bicameralism is about legislative review.

But there is some evidence that bicameralism affects policy formation, and this is true even for weak and unelected bicameral chambers, where the effect is known as "Cicero's puzzle" (Tsebelis and Money 1992, 1997). Although bicameralism does not affect the executive's choices in forming and administering a government, there appears to be a relationship in parliamentary systems between the length of a government's time in office and whether it has a majority in the second chamber (Druckman and Thies 2002).

The issue of the impact of upper chambers on intergovernmental relations within a federation is a point of much speculation, though with little clear evidence. For example, a proposed shift of the Canadian Senate from being appointed federally to being appointed by the provincial governments was characterized by the federal government as a move to decentralize but was seen by at least one province as likely to centralize the federation instead (Smith 2003). Not surprisingly, an elected Senate has also been characterized as having both centralizing and decentralizing tendencies (Smiley 1985).

This debate must return to the simple fact that bicameralism is about legislation and not governance, and the areas of legislative jurisdiction are determined by constitutions and courts. So changes in methods of selection that would make an upper chamber more effective are unlikely to affect provincial legislation or provincial legislative competence in any way. At the federal level, on the other hand, a more effective upper chamber would increase the number of players who have vetoes over federal legislation and thus increase the probability of phenomena associated with multiple vetoes: namely, policy stability, government instability and independence of the bureaucracy and the judiciary (Tsebelis 2002, 143; Tsebelis and Money 1997).

Where the provincial governance function may be negatively affected, albeit indirectly, is by a shift in the relative leverage of various political actors. For example, a popularly elected senator may obtain greater public attention and support for her policy opinion than a provincial cabinet minister from the same region who is elected in a much smaller constituency. These changes in politician-voter dynamics are tied as much to the individual actors as they are to method of selection, so it is impossible to predict with any accuracy how an elected Senate will translate into political influence. Nevertheless, it is reasonable to assume that members of a small chamber with only a few senators elected province-wide would be able to obtain media and public attention for their viewpoints and that these senators, individually and collectively, would make claims to electoral mandates, at least in opposition to the federal government. This has certainly been the case in other countries with directly elected senates. What impact this would have on provincial legislatures and governments is much more unclear.

Possible electoral systems

While elected upper chambers are the most common approach to bicameralism, there is no common format by which that election occurs, and each electoral system will result in a different translation of votes to seats in a legislature.

Because of the plethora of permutations, political scientists have developed a number of means of cross-system comparison (see, for example, Martin 1997; Reynolds and Reilly 1997; Blais 1988; Rae 1967). Of particular relevance are three key factors that can each have a substantial impact on electoral outcomes: the ballot structure, how voters are permitted or constrained in expressing their vote choice; district magnitude, the number of seats in each district; and the electoral formula, the mechanism used to count votes in order to allocate seats (Blais and Massicotte 2002). Additional factors are the timing of elections (whether they coincide with the lower-chamber or provincial elections or occur at another time), the role of political parties (control of the nomination process, parties'

role in campaigning and their profile on the ballot) and the length of term (as compared with the term for members of the lower chamber). These are important considerations for an upper chamber because they can affect both representation and review.

To simplify our discussion of electoral systems, we present six general electoral systems that have been considered at different times for the Canadian Senate.[10]

Single-member plurality

In these elections, candidates compete in single-member constituencies, and the representative elected is the person who receives the most votes (not necessarily a majority of the votes cast, simply more than the next candidate). Plurality is a "winner-take-all" system (also known as "first-past-the-post"), so in a race between three equally popular candidates, for example, a candidate can win with as little as 33.4 percent of the popular vote. Because of the uneven distribution of votes across ridings, this will occasionally result in a party winning a majority of seats in a legislature with less than a majority of votes, or perhaps even a smaller percentage of votes than another party. However, the exaggerated parliamentary majorities, it is argued with respect to lower chambers in a parliamentary system, are a worthwhile feature because the system delivers clear mandates to govern and sufficient majorities to implement a legislative program. There is no ignoring the fact that this system is designed to disenfranchise smaller parties, and the parties that are most adversely affected are the ones whose support is not concentrated regionally.

Multi-member plurality

Elections under this system use larger constituencies and elect several representatives for each constituency by plurality, the same principle as in single-member plurality. If a constituency is to be represented by three members, then the candidates who came first, second and third are elected. Large multi-member constituencies operating under plurality will tend to elect most or all of their representatives from the same political party. Since these are larger ridings with multiple representatives, the connection between the voter and the representatives, it is argued, is weaker and the influence of the party greater (Madison [1787], in Rossiter 1961; Silva 1964).

Single-member majority

Here the winner must receive a majority – 50 percent plus one vote. This usually requires either multiple-round voting or the use of the alternative-vote system. In the former case, the usual practice is to hold two rounds of voting, with the second round (a runoff) restricted to the top two candidates. With the alternative vote, the voters rank candidates in order of preference on a single ballot. If no candidate gets a majority of first preferences, the candidates who received the fewest votes are eliminated one by one, and their votes are transferred according to voters' second preferences (and so on) until one candidate achieves a majority. It is claimed that runoff elections consolidate support behind the successful candidate and encourage coalition building and cross-party alliances in the final stages of the campaign, whereas the alternative vote simply translates a small lead into a more decisive majority of seats by discriminating against those at the bottom of the poll (Norris 1997, 302).

Multi-member majority

Several representatives are elected by majority in each constitutency. Presumably a single ballot using the alternative vote could be fashioned, though as yet no country has done so. Instead, two-round voting is the norm. Either voters choose from party lists, so that the two parties that received the most votes in the first round compete in the second (with the winning list gaining every seat in the constituency); or they elect individual candidates with an absolute majority in the first round, and further candidates who get a plurality in the second, if a second vote is needed. Obviously the use of party lists gives the party great influence over the candidates, though it will also often lead to diverse representation as parties try to balance their lists along gender, racial-ethnic, linguistic and regional lines.

Proportional representation

Under proportional representation (PR), voters choose between lists of candidates offered by political parties and the seats are distributed among the parties according to their proportion of the vote. So if a party receives one-third of the vote, it receives one-third of the seats in the chamber. Minimum thresholds are often used to limit the number of smaller parties represented in a legislature, and several alternative formulas can be used to calculate proportionality. When a "closed" list is used, votes are cast for a party, and the candidates who take the seats on behalf of that party are the ones with the highest priority as determined by the party. With an "open" list, voters can express a preference for a particular candidate within the party list. Proportional representation is usually credited with ensuring that a larger number of smaller parties are represented in a legislature, a feature that is usually

described in democratic terms as ensuring that "every vote counts." Multi-member constituencies are a necessary condition in a proportional representation system. While closed lists provide political parties greater control over their candidates than open votes, they usually result in greater diversity in representation. For example, it is well chronicled that the list system of PR facilitates female candidates' entry into politics, because parties strive for gender balance on their lists (Rule 1992; Rule and Norris 1992; Welch and Studlar 1990).

Single transferable voting

This is a variation on proportional representation which can best be described as "personal PR." In this system voters are not confined to a party's list but rather rank the candidates and candidates must receive votes beyond a specific quota to win. Voters' ballots are reallocated to their next preferences when there are excess votes for an elected candidate or when their first candidate is eliminated. Choices from among candidates of one particular party are possible, but the ballot design can make partisan predispositions less central. This system is also claimed to induce candidates to develop personal positions on the issues, though it may equally result in candidates from the same party regularly competing against each other, undermining party cohesion in the process (Katz 1980).

Clearly the choice of a system can lead to dramatic differences in electoral outcomes. However, there is no "best" or "better" system, since the relative merits of any one dimension of a system are so closely tied to competing beliefs about what should be the core principles of a representative democracy.

The question for any polity in considering which system to adopt therefore needs to be, What democratic principles are most desirable? Political equality, representation of diverse viewpoints, accountability, clear choices in policy, governability, party system stability and the ability for the system to handle social conflict are all relevant and sometimes conflicting considerations. At the simplest level, selecting an electoral system is about choosing between efficient and effective versus responsive and accountable government, and about how important it is to be fair to minor parties (and the voters who support their policies) (Norris 1997).

Finally, of course, for political parties, choosing a system is about setting the rules of the game. Any rule is bound to advantage some parties over others.

As table 2 shows, each of the six systems has been adopted for directly electing an upper chamber in at least one country, and many countries have created unique variations. In Bolivia, for example, multi-member plurality is used but one seat is given to the second-place party to ensure diversity of representation in the chamber.

The only obvious patterns that seem to emerge are that the majority of second chambers hold their elections at the same time as the lower-chamber elections, and that most have the same political parties responsible for the nomination process in both chambers. Additionally, most of the countries that hold their elections concurrently with the lower-chamber vote stagger the terms for their senators, so that only part of the chamber is elected at any one time.

The Australian experience

The comparative analysis does not point to any emergent trends that would commend one system over another, but the lessons from other countries can be informative on how dual elected chambers might operate in Canada. From this perspective, Australia is perhaps the most useful example, as it shares several features that are relevant to Canada. It uses the Westminster model of responsible parliamentary government and it is also a federation. Of course, the important difference is that it uses the proportional representation system of single transferable voting for its upper chamber.

There are also many differences that make Australia distinct from Canada, including the fact that it is less culturally and regionally divided, has a lower chamber elected by the alternative vote, has state legislatures that are also bicameral (with one exception) and has a history of state political parties being central to the nomination process for candidates to the Senate. So Smiley's admonition that caution must be exercised when drawing lessons from this island continent should be kept in mind (1985).

Australia has six states, which are represented in the Senate by 12 senators each, and two territories, which are represented by 2 senators each, for a total of 76 members (the numbers are based on a constitutional requirement that the Senate be half the size of the lower chamber, the House of Representatives). The senators for the territories stand for election every three years along with half of the senators from the states, and this election is held at the same time as election for all members of the lower chamber. (The leader of the party that wins the largest number of seats in the lower chamber is entitled to form a government, as in Canada.)

When Australia was created as a federation, in 1901, the Senate was elected using the plurality sys-

Table 2
Electoral Systems Used for Senate Elections Where the Upper Chamber Is Directly Elected

Country	District magnitude	Timing of elections	Parties	Terms (years)
Single-member plurality				
Dominican Republic	30 separate constituencies (29 provinces, 1 federal district)	Same time as lower-chamber elections	Same parties	4 years
Multi-member plurality				
Bolivia	3 seats per department (2 seats to majority party, 1 to next party)	Same time as lower-chamber elections	Same parties	5 years
Brazil	3 seats per state and federal district	Same time as lower-chamber elections	Same parties	8 (33% and 66% alternating every 4 years)
Palau	Based on population (multi-member and single districts)	Same time as lower-chamber elections	No parties	4 years
Philippines	Nationwide constituency	Same time as lower-chamber elections	Same parties	6 (50% every 3 years)
Poland	2-4 seats per constituency	Same time as lower-chamber elections	Same parties	4 years
US	2 seats per state (majority needed in Georgia and Louisiana)	Same time as lower-chamber elections	Same parties	6 (33% every 3 years)
Single-member majority				
Czech Republic	81 separate constituencies (with two-round voting)	Separate from lower-chamber elections	Same parties	6 (33% every 2 years)
Multi-member majority				
Haiti	3 seats per department (with two-round voting)	Same time as lower-chamber elections	Same parties	6 (33% every 2 years)
Switzerland	2 seats per canton (with two-round voting)	Same time as lower-chamber elections	Same parties	4 years
Single transferable voting				
Australia	12 senators per state and 2 per territory	Same time as lower-chamber elections	State parties	6 (50% every 3 years)
Proportional representation				
Colombia	100 seats nationwide (2 seats for Aboriginal people)	Same time as lower-chamber elections	Same parties	4 years
Paraguay	45 nationwide seats	Same time as lower-chamber elections	Same parties	5 years
Romania	42 constituencies with 2-12 seats each (1 senator per 160,000 people)	Same time as lower-chamber elections	Same parties	4 years
Mixed-member proportionality				
Mexico	3 seats per state plus federal district (2 go to majority party and 1 to next party, and 32 additional seats are used for list PR)	Same time as lower-chamber elections	Same parties	6 (50% every 3 years)
Japan	73 from multi-member and single-member constituencies; and 48 seats allocated using PR	Separate from lower-chamber elections	Same parties	6 (50% every 3 years)

Sources: Based on Inter-parliamentary Union (n.d.); Central Intelligence Agency (2008).
Note: There are additional country variations not reflected in the classification.

tem. Between 1918 and 1949, Australian senators were elected by the alternative vote (see Sharman 2008). Both systems resulted in the government winning a majority in both the upper and lower chambers. Since 1949, the Senate has been elected using single transferable voting, which has resulted in an increase in the number of parties elected and in none of these parties (usually) obtaining a majority in the upper chamber.

To understand the dynamics of representation in the Senate in Australia, one must also understand the dynamics

of elections to the lower house. Two centre-right parties, the Liberal Party and the National Party, have a permanent coalition and have proven effective in working together to use the alternative vote system of the House of Representatives to win majorities. The coalition partners make strategic moves to ensure they win the most seats, including making recommendations to supporters on how to mark their ballots. This strategic approach, combined with the alternative vote system, has resulted in smaller parties finding themselves largely excluded from winning seats in the lower chamber. They have responded by focusing their resources on the upper chamber.

As table 3 illustrates, the distribution of seats since the election of 1974[11] has resulted in clear majorities in the House of Representatives for either the Liberal/National coalition or the Labour Party. Yet in the Senate chamber, with the exception of three parliaments, the governing party has not had a majority. Additionally, the number of minority parties represented in the Senate has increased, particularly since the mid-1980s.[12]

Not surprisingly, the literature on bicameralism in Australia tends to follow the trend noted by Tsebelis and Money for federal countries (1997), in that it focuses on conflict and power distribution between the two chambers. Added to this is a normative thread about responsible parliamentary government under the Westminster model. The conclusion is invariably that the country is under constant threat of political gridlock, endless bargaining and trade-offs (see, for example, Jackson 1995).

These concerns over the governing party's failure to control the Senate are not universal. Uhr, for example, argues that having a second chamber with no clear majority is a useful check in keeping with the federal principle of divided government and gives voters the opportunity to split the ticket, placing different parties in control of different political institutions. Just as governments claim that elections provide them with a mandate to govern, the smaller parties in the Senate equally claim a mandate to keep the government accountable or, as the Australian Democrats' Senate election slogan put it, to "keep the bastards honest" (Uhr 1999, 98).

The Harper Government's Senate Reform Proposals

The Harper government's initiatives were just the latest in a long line of proposals to "reform" the Canadian Senate. Dozens of Royal Commissions, parliamentary hearings and governmental and non-governmental bodies have proposed wholesale changes, with most since the 1990s recommending direct election (see Stilborn 2003 for a review of the key proposals, including their suggestions for possible electoral mechanisms). Among these, the Canada West Foundation's is particularly relevant, as it directly informs the Harper government's own proposals (see McCormick, Manning and Gibson 1981).

There has been surprisingly little academic research on the Canadian Senate, giving this chamber the dubious distinction of being "both the most written about and the

Table 3
Distribution of Seats between Government and Opposition Parties in the Australian Parliament, 1974–2007

Government			House of Representatives							Senate					
Election	Party	Total seats (N)	Labour	%	Liberal	%	National	%	Other	Total seats (*N*)	Labour	%	Coali-tion	%	Other
1974	Labour	127	66	52	40	31	21	17	0	60	29	48	29	48	2
1975	Liberal	127	36	28	68	54	23	18	0	64	27	42	35	55	2
1977	"	124	38	31	67	54	19	15	0	64	26	41	35	55	3
1980	"	125	51	41	54	43	20	16	0	64	27	42	31	48	6
1983	Labour	125	75	60	33	26	17	14	0	64	30	47	28	44	6
1984	"	148	82	55	45	30	21	14	0	76	34	45	33	43	9
1987	"	148	86	58	43	29	19	13	0	76	32	42	34	45	10
1990	"	148	78	53	55	37	14	9	1	76	32	42	34	45	10
1993	"	147	80	54	49	33	16	11	2	76	30	39	36	47	10
1996	Liberal	148	49	33	75	51	19	13	5	76	28	37	37	49	11
1998	"	148	67	45	64	43	16	11	1	76	29	38	35	46	12
2001	"	150	65	43	69	46	13	9	3	76	29	38	35	46	12
2004	"	150	60	40	75	50	12	8	3	76	28	37	39	51	9
2007	Labour	150	83	55	55	37	10	7	2	76	32	42	37	49	7

Sources: Based on Parliament of Australia (2007); Inter-parliamentary Union (n.d.).
Note: For illustrative purposes, National members are shown separate from the Liberal and Country Liberal members in the House of Representatives, though grouped together as coalition members in the Senate portion of this table.

least studied of Canadian political institutions" (Franks 1999, 121). Similar to the scholarship in other countries that have weak or unelected senates, research has been almost singularly focused on the roles and functions that the Senate actually performs (MacKay 1963; Kunz 1965; Forsey 1982; Joyal 2003). Attention has been given to the inherent problems due to its unelected and affluent membership (Campbell 1978), or to revisiting what the country's founders intended (Ajzenstat 2003), with a critical eye toward modest improvements that maintain the body's historic strengths (Forsey 1984; Mallory 1984; Franks 1987; Smith 2003).

The current Canadian Senate

The Canadian Senate has remained virtually unchanged from the configuration agreed to by the Fathers of Confederation in 1867. It is an appointed chamber with senators chosen to represent one of the provinces or territories of Canada, as illustrated in table 4. The number of seats is apportioned not equally by province but rather on the principle that four distinct geographic regions of Canada should be equally represented: 24 seats each are allocated to the Maritimes, Quebec, Ontario and the West.[13] Newfoundland and Labrador and the three territories are not counted in these four regions.[14]

Senators are summoned by the governor general, though appointments are made solely upon the decision of the prime minister. The appointment is until age 75.[15] The powers of the current Senate are essentially identical to those of the House of Commons, although because it is a non-elected body, these powers are rarely exercised to their full potential.

The qualifications for appointment, which were clearly a more significant issue at the time of Confederation, are that a person be at least 30 years of age, be a Canadian citizen and have at least $4,000 of property in the province for which he or she is being appointed (the person also must have a net worth of $4,000). In the case of Quebec, the property must be in a specific division within the province to ensure the representation of the various sectional interests – linguistic, cultural and religious – within this province. In practice, prime ministers also appoint senators to represent minority community interests in other provinces.

The only constitutional limits on the Senate's powers are that money bills must originate in the Commons and must come from the cabinet, which controls the "royal recommendation" necessary for the introduction of such legislation. The Senate may not amend these money bills to increase taxes, duties or public expenditures (though it may decrease them). And the Senate may only delay for 180 days constitutional amendments that have received the concurrence of the provinces and of the House of Commons.

Table 4
Provincial and Territorial Distribution of Seats and Vacancies in the Senate, Canada, September 2008 and Projected 2014

Province/ territory	Number of Senators	Vacancies		
		Current	2009	2014
Newfoundland and Labrador	6	1	2	4
Nova Scotia	10	3	4	5
Prince Edward Island	4	1	1	2
New Brunswick	10	1	3	7
Quebec	24	4	7	13
Ontario	24	2	5	13
Manitoba	6	0	1	2
Saskatchewan	6	0	1	2
Alberta	6	0	0	3
British Columbia	6	3	3	4
Northwest Territories	1	0	0	0
Nunavut Territory	1	0	1	1
Yukon Territory	1	1	1	1
Total	**105**	**16**	**29**	**57**

Source: Based on Senate of Canada (2008a, 2008b).

The constitutional amending formula is central to the debate over reform of the Senate; the formulas are set forth in part V (sections 38-49) of the *Constitution Act, 1982*. The "general amending formula," requiring the agreement of seven provinces representing 50 percent of the population, governs, among other things, the "powers of the Senate and the method of selecting Senators" and "the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators" (section 42).

In 1996, following a referendum in Quebec on independence, Parliament adopted *An Act Respecting Constitutional Amendments*, which prevents the federal government from placing any constitutional amendment under the 7/50 formula before Parliament unless the proposed amendment has been approved by the provincial legislatures representing the majority of the population in each of five regions of Canada.[16] This gives British Columbia, Ontario and Quebec complete vetoes over constitutional changes in this class (and makes the legislatures of Nova Scotia and Alberta central to passage in their two regions). And two provinces (Alberta and British Columbia) have adopted legislation requiring that a referendum be held before legislative concurrence is given to any proposed constitutional amendment.

The most onerous amending formula is one that requires passage by all of the provincial legislatures, and this level of unanimity would likely be required to abolish the Senate (though this is not expressly stated). The least onerous amending formula requires only passage through Parliament (in this instance the Senate must agree and cannot have its vote overridden in 180 days) and includes matters "in relation to the executive government of Canada or the Senate and the House of Commons" (section 44). The fourth amending formula pertains to matters that affect only one or more provinces, but not all; these amendments would require only passage through Parliament (which includes the Senate) and the provincial legislature(s) in question. But the only matter concerning the Senate that could be construed as not affecting all provinces would be the requirement that Quebec senators' property be held in a specific electoral division.

Another limitation on reform is the Supreme Court of Canada's 1980 decision in a reference over the federal government's desire to alter the upper house unilaterally, which is likely to have relevance.[17] In this ruling the high court denied Parliament the right to make changes that might alter the "fundamental character" of the Senate; it defined the Senate as a "chamber of sober second thought," which is a central consideration with respect to the length of senators' terms; and it said the Senate's representational structure was reflective of the Canadian federation. It was the Court's opinion that for the government to alter either of these principles, the provinces would need to agree.

The Harper government's proposal

As already noted, the Harper government's approach was unique in both proposing a mechanism for election and trying to make these changes without involving the provinces in a constitutional amendment. We turn now to the two bills that were before Parliament at the time of the 2008 election call.

The *Senate Tenure Bill* was itself a constitutional amendment that would have limited Senate tenure to an eight-year, nonrenewable term. The argument that Parliament has the authority to enact this constitutional amendment on its own, without the provinces, was based on the government's claim that an eight-year term is sufficient to provide the experience and institutional memory necessary for this chamber to continue to exercise its review function as a chamber of sober second thought and to ensure regional, provincial and sectional representation.[18]

This bill was grandfathered so vacancies would arise as current senators reached age 75. As of September 2008 (table 4), there were 16 vacancies in the Senate; the total would go up to 29 by the end of 2009 and to 57 just five years later. Of course, any deaths or resignations could increase the total.[19] It is worth noting that as part of the government's democratic reform agenda, Parliament has already adopted legislation to fix the date for House of Commons elections. Had an election not been triggered early by Stephen Harper's request on September 7, 2008, the Governor General dissolve Parliament, the next general election would have been held on October 19, 2009. All future elections were to be held on the third Monday in October four calendar years after this one (although elections could be triggered earlier by a vote of nonconfidence by the House of Commons or by the dissolution of Parliament by the governor general). If both bills concerning the Senate had been adopted by Parliament before an election call in 2009, Canadians would have been voting in the 2009 general election to elect one-quarter of the Senate. Based on the dates contained in these pieces of legislation, it would appear that the intention is to make Senate elections coincide with Commons elections – with the entire House of Commons standing for election every four years and the Senate elections staggered, so half the seats are up for election in each general election. This is the approach to bicameralism that is employed in a number of countries, and it is the principle underlying the US Congress, though only one-third of their Senate is elected at every election for the House of Representatives. If these pieces of legislation are adopted during this coming Parliament, it is still possible that as much as half of the Canadian Senate could be elected following the next federal election.

The *Senate Appointment Consultations Act* was the legislation that would have allowed the federal government to conduct an election in any province or territory to canvass Canadians on who should fill Senate vacancies. The "consultative" elections would have been called by the federal government at the discretion of cabinet and, in support of the government's constitutionality claim, there was a great deal of flexibility as to when elections would be called.[20] The government would not have been obliged to fill every vacancy at the same time or within a set period of time, and it could even have held elections for positions that were not yet vacant. Elections could have been held simultaneously with either a federal general election or a provincial general election, though six months notice would be required to hold a Senate consultative election during a provincial election.[21]

Elections would have been province-wide. The winners of these elections would have had their names submitted by the prime minister to the governor general for summons to the Senate to fill vacancies.

The constitutional requirements would still have applied, so that in addition to being 30 years of age and a Canadian citizen, a candidate would have had to acquire at least $4,000 of property in the province (or, in the case of Quebec, in one of the 24 divisions within the province) where there was a vacancy, clear of debt, before he or she could be appointed.

Candidates could have been endorsed by political parties but could not have received funds from parties by which to mount their campaigns; however, political parties would have been allowed to share office accommodation and provide professional services and lists of members and contributors to a nominee. Senate candidates would have been restricted to raising money through indexed $1,000 donations from individuals and would have been allowed to give no more than twice that amount to their own campaigns. Third-party advertising, including any political party spending, would have been capped at $3,000 per nominee to a maximum per province based on that province's portion of a Canada-wide limit of $150,000. These were the same donation limits used for elections to the House of Commons, but in Commons elections these restrictions are tied to the public funding of candidates' campaigns.[22] Another contrast with Commons elections was that there would have been no spending limits for Senate candidates themselves.

A number of other administrative measures in the legislation mirrored clauses in the *Canada Elections Act* (the law that governs House of Commons elections), such as financial auditing, retention of documents, forms and notices, qualifications to vote, candidate access to buildings to campaign and place posters, and distribution of surveys.

The electoral system to be used for Senate elections under the *Senate Appointment Consultations Act* was to have been single transferable voting (STV).[23] In STV, as described above, voters are asked to rank candidates in their order of preference by numbering the candidates on the ballot. The normal practice with ballots is to list the names in alphabetical order, with party affiliation shown for those candidates who have won a registered party's nomination. To avoid the possibility that a person might gain an advantage simply by having their name listed first, the first name on the ballot is varied from one voting area to another. The ballots are then counted in a way that aims to ensure, first, that the candidates with the highest combined preferences are elected and, second, that there is diversity in representation. Candidates who obtain a certain quota of the votes (based on the votes cast and the number of positions being contested) are elected.

Table 5 uses data from the 2006 federal general election to illustrate the sort of spending and the number of votes that might be involved in a Senate election in each of the provinces. The spending figures are simply the provinces-wide candidate spending limits set for House of Commons elections (notwithstanding the differences in

Table 5
Hypothetical Spending Limits and Quota of Votes Needed by Each Candidate to Win a Senate Seat under Single Transferable Voting

Province/territory	Province-wide candidate spending limits ($ thousands)	Current vacant seats (*M*)	Quota of votes needed (thousands)[1]	Potential seats for election (*M*)	Quota of votes needed (thousands)[1]
Newfoundland and Labrador	557	2	76	3	57
Nova Scotia	842	2	159	5	80
Prince Edward Island	251	1	39	2	26
New Brunswick	746	2	136	5	68
Quebec	5,931	2	1,230	12	294
Ontario	8,576	2	1,886	12	435
Manitoba	1,084	2	172	3	129
Saskatchewan	1,082	2	154	3	116
Alberta	2,169	2	478	3	358
British Columbia	3,028	2	609	3	457
Northwest Territories	76	n/a	n/a	1	7
Nunavut Territory	79	n/a	n/a	1	8
Yukon Territory	74	n/a	n/a	1	5

Source: Based on Elections Canada (2006a, 2006b).
Note: Figures in this table are based on the actual candidate spending limits, electors on the list and votes cast for the 2006 House of Commons election. Amounts are rounded to nearest thousand.
[1] This quota is set by the formula $A / (B + 1) + 1$, where A is the total number of valid votes cast and B is the number of Senate seats being contested.
n/a not applicable

rules for Senate and Commons elections outlined above). According to the government, the decision to set no spending limits for Senate candidates was in recognition of the high costs of running province-wide elections and of the $1,000 limit for private donations (Legislative Committee on Bill C-20 2008a, 1610). However, unlike candidates for the House of Commons, Senate candidates could have raised money in advance of the election being called.

As noted, a quota based on the number of ballots cast and the number of seats available determines the number of votes a candidate must receive in order to be elected under STV. As is evident from table 5, the number of votes needed would be lower when more Senate seats are being contested in a province at one time. For example, to fill the two Senate vacancies that currently exist in Ontario, the successful candidates would each need to receive over 1.8 million votes, and each would be allowed to spend in the neighbourhood of $8 million to campaign across this large province. However, if there were 12 positions being contested in Ontario, each candidate would need only 435,000 votes to win, and presumably the necessary expenditure would be less. (Campaign spending, however, would be entirely dependent on the scale of campaign a candidate wished to mount, because the size of the province does not change according to the number of seats being contested.) The large amount of money that could be involved in Senate elections is a practical consideration that has not been widely discussed.

Practical implications

The question of numbers is central to understanding how this electoral system would work in Canada. The number of Senate seats constitutionally guaranteed ranges from the high of Ontario's and Quebec's 24 seats to the low of PEI's 4 and the territories' 1 each. Most provinces have 6 (the 4 western provinces and Newfoundland and Labrador) or 10 (New Brunswick and Nova Scotia). Under the *Senate Appointment Consultations Act*, the assumption was that roughly half the Senate seats would be up for election every four years. Therefore, STV could be expected to operate differently in different provinces.

To get a relatively proportional result, the ideal number of seats that should be contested in a single election using STV is five, according to Taagepera and Shugart (1989, 23). Most provinces would be electing three to five senators at a time, which would ensure some degree of proportionality. However, in the small provinces and the territories and in the first few Senate elections (see table 4), only one or two Senate spots would be open for election, which means that the system would function more like the alternative vote, used in single-member constituencies. In the two largest provinces, there would be 12 seats available if half were elected each time, which would challenge the capacity of voters to identify with a sufficient number of individual candidates. (A solution in these two provinces would be to divide them specifically for the purposes of the Senate into three or four separate electoral divisions; see Hicks 2007.)

The arguments in favour of the STV system are made by McCormick, Manning and Gibson (1981), who suggest that the central criterion governing choices among possible electoral systems should be the extent to which a system contributes to the role of senators as members of a chamber devoted to regional representation. From that perspective, systems emphasizing the role of political candidates as party representatives should be avoided at all cost. Further, the single transferable vote is advocated on the grounds that it permits voters to choose their representatives on the basis of individual characteristics.

This idea of regional voices is the reason that some Senate reform models (including Triple-E) recommend that Senate elections be held only concurrently with provincial elections. The Harper government stated that it would hold most elections in connection with federal general elections, though the Bill gave the prime minister the flexibility of both options (Legislative Committee on Bill C-20 2008a, 1535).

The experience of federal elections in Canada suggests that regionalism would manifest itself in an elected Senate regardless of the timing of elections, particularly under the STV system. In the House of Commons, the Bloc Québécois and the Reform Party, and before them Social Credit, have all been able to sustain themselves as strong regional parties under the single-member plurality system. STV is even more responsive to these regional forms of political action. The primary impact of election timing might be on the issues that have saliency: holding Senate elections concurrently with provincial elections might mean senators would be elected at a time when voters are focused on provincial election issues.

In the case of Quebec and Ontario, where 12 Senate seats would probably be contested at once, partisan loyalties might become more central to decision-making, as it would be harder for voters to distinguish among the many candidates. However, the Harper government departed from the Australian approach of offering voters a ballot choice among

political parties, rather than ranking candidates directly. The proposed Canadian system would have reduced, though not eliminated, the use of party affiliation as a shortcut.

The other departures from Australia's STV system for Senate elections were the financial restrictions and the limits on party involvement in the campaigns of party candidates. The cost of a Senate campaign in Canada would run to hundreds of thousands and even millions of dollars (see table 5), yet because of the $1,000 donation limit, only those who have some capacity or machinery to raise a large number of donations could run. This suggests that the successful candidates under STV would be those with wide personal appeal or an appeal to a particular, albeit sizeable, segment of the province's population.

Certainly, a Senate elected under the system advocated by the Harper government would be a chamber that is diverse in membership in terms of political parties represented. It would be very difficult for any one party to have a majority in this second chamber.

Constitutional implications

As the Supreme Court has said, "The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority...including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities."[24] So, not surprisingly, the House of Commons and Senate committees that were asked to examine the two Senate reform bills during the last Parliament spent time on the question of constitutionality – or, more accurately, on the question of which of the four amending formulas outlined above, if any, apply to the bills.

As noted, the government's position was that the *Senate Tenure Bill* fell under section 44 of the *Constitution Act, 1982*, and that only the approval of Parliament was necessary to make this constitutional change; and that as the *Senate Appointment Consultations Act* did not alter the method of appointment, but only permitted consultation in advance of that appointment, it was not a constitutional change at all.

This position is not universally supported. For example, Desserud (2008) makes the case that it is the general amending formula, and not section 44, that is the default mechanism for constitutional amendments. Although section 44 replaced section 91(1) of the old *Constitution Act, 1867*, and section 91(1) was the clause by which a previous change to tenure (in 1965, reducing appointment from life to age 75) was made, the new section is more restricted, coming as it does in the context of a comprehensive set of amending formulas and after the Supreme Court's 1980 decision in *Re: Upper House*.[25] It is his position that a change to the tenure of senators therefore requires the support of two-thirds of the provinces (Desserud 2008).

Heard makes a similar case with respect to the *Senate Appointment Consultations Act*, accusing the government of trying to do indirectly what it could not do directly. He is unconvinced by the flexibility accorded the prime minister to ignore the outcome of consultative elections, noting that a referendum on Quebec independence is equally consultative and non-binding, and yet even the Supreme Court has acknowledged that it is now of such weight as to be an obligation on governments stemming from the democratic principle of Canada's Constitution (Heard 2008).

Of course, there is no democratic principle that underlies the Canadian Senate as it now stands – in fact, quite the opposite. Even in advance of the Confederation meetings, the delegates from Canada had agreed to a compromise Parliament hinged on the second chamber: they had experience with an elected second chamber and specifically opted for an unelected body so as to meet French-Canadian representational demands while at the same time ensuring that the House of Commons and the government would not be unduly restrained when it came to routine legislation (Moore 1997).

It is well established in both the comparative and the domestic literature that second chambers that are unelected do not have the legitimacy to exercise a legislative veto in the same way that elected chambers do. The very act of election would have a transformative effect on the chamber's legitimacy and thus its powers.

While the introduction of one or two elected senators might not alter the institution fundamentally or irreversibly, if the proposed reforms had passed, there would have been a critical mass of elected senators that would have transformed this chamber. As table 4 shows, there are currently 16 vacancies; by next year one-quarter of the Senate seats could have been up for election and by 2014 over half. It is reasonable to expect that at some point there would have been enough elected senators to encourage the Senate to routinely oppose the government and the House of Commons; to create a constitutional convention that all future appointments to the Senate have to be made by election; and to put pressure on the remaining appointed senators to vacate their seats in favour of directly elected representatives.[26]

Quebec poses an additional constitutional challenge. The property qualifications for Quebec senators were designed to ensure that particular sectional interests

within the province were represented, as well as to keep Quebec in balance with the other regions. This is a question of minority representation. Specifically, the 24 Senate divisions for Quebec ensure that senators who represent anglophone, Protestant and, more recently, other minority interests within that province are present in the Senate alongside the francophone-Catholic majority. Bonenfant has suggested that the founders of Canada also believed that the separate divisions for Quebec would ensure a greater independence of francophone senators from the government (1966). While election through STV would not substantively alter the independence of Quebec senators, this electoral mechanism would eliminate the ethno-linguistic minority dimension of this province's representation.

The same would likely be true for New Brunswick. While there are no property residency requirements to ensure both French and English senators are appointed to the Senate from this province, it has been the practice to respect this linguistic division. STV might continue to deliver duality among New Brunswick senators, given each community's size and localized nature, but this would by no means be assured. Proportional representation is designed to ensure diversity in *political*, not cultural, representation within a legislature.

It is therefore clear that the proposed changes, even though they were billed as modest, temporary and limited, had constitutional consequences. They would have fundamentally altered the second chamber of Parliament and would have had an impact on the principles of federalism, democracy and minority representation. Additionally, they would have altered the balance between the two legislative chambers. In short, they would have resulted in structural change.

Conclusion

The current Senate and several provinces, most notably Quebec, objected to the federal government proceeding with its reform legislation without first obtaining a ruling from the Supreme Court on whether it was constitutional. Quebec even threatened to go to the Quebec Court of Appeal on its own. A central issue for the Supreme Court's consideration, if this or a similar initiative should be attempted in the next or future parliaments, would be in part whether these changes structurally alter the Senate, which the Court has previously found to be a fundamental aspect of the federal union.

Looked at in comparative perspective, the question of whether structural change can be achieved through electoral rules would point to a resounding yes. Elected upper chambers have the legitimacy to use their full range of constitutional powers. The more difference there is between the electoral mechanisms used in the upper and lower chambers, the more the upper chamber would be able to claim to represent a different dimension of society and therefore the more legitimacy it would enjoy. A chamber elected by the citizens, even through consultative elections, would have a different representational role than the one the Canadian Senate currently is predicated upon – shifting representation from community and minority interests toward political and issue interests.

The Australian experience in particular shows that an upper chamber elected using single transferable voting will return a number of smaller parties to the chamber. The current Canadian Senate numbers mean that STV would operate differently in each province; this outcome, combined with the financial restrictions and ballot design that are distinct from Australia's, means that the Canadian Senate would be likely to be even more diverse than Australia's. Also unique was the plan to hold some or all elections in connection with provincial elections, a feature that would introduce a random element into the equation. The fact that the Canadian House of Commons is itself a chamber that regularly elects a number of political parties and has not in recent years delivered a decisive majority to a government adds a layer.

That being said, comparative examination also shows that it is common for elected chambers to have coequal powers, that the usual representation configuration for federal countries is to have the upper chamber based on the formal geographic administrative units (though not necessarily based on an equal distribution of seats), and that using a different system of election can strengthen the upper chamber's capacity to represent different interests and perform legislative review. Looked at from this perspective, the specific structural changes advocated by the Harper government were defensible in light of other countries' experience. But they are structural changes and should be identified and debated as such.

Therefore it is up to Canadians to consider the normative questions of what role they wish for their upper chamber, and what electoral system best represents their core values. The answers to these questions can be found only in an open and informed deliberation.

Notes

1 Institutions of governance have a permanence, which is reinforced and protected by constitutionalism and the rule of law. Members of an institution will change regularly, as will the relative fortunes of political parties or groups, but the structures themselves remain largely stable. Structural change refers to change that is equally stable and permanent, and that occurs in the internal composition of the institution and in its interactive relations with other institutions of governance.

2 For example, Prince Edward Island held a referendum on mixed-member proportionality in 2005. British Columbia convened the Citizens' Assembly on Electoral Reform, which recommended a change to STV; the recommendation was also put to a referendum in 2005 (and a second one is planned for 2009). Ontario held its own citizens' assembly, which recommended a mixed-member proportionality system. This recommendation was put to Ontario citizens in a referendum in 2007.

3 Bicameral legislatures have two distinct assemblies within a single legislature. One of these assemblies is usually designated to be an elected chamber, whose representational structure comes close to representing the population equally. The chamber using "representation by population" is, with one exception, always given the label "first" or "lower" chamber (or house), as it is seen as closest to the people. The hierarchical designation "upper house" arose in countries where that body was used to represent aristocratic birth. The one exception is the Netherlands, where the name of the popularly elected chamber is Tweede Kamer (second chamber) and the formerly aristocratic chamber is named Eerste Kamer (first chamber), since it came into existence first. The terms "senate," "upper chamber" (or house) and "second chamber" (or house) will be used interchangeably throughout this study.

4 Unitary systems of government have only one constitutional level of government, but there are invariably local governments (such as city governments) established and assigned delegated authority to deliver certain services by the central government. Federal systems, however, have two formal levels of government to which the Constitution has assigned different or shared legislative and administrative responsibilities. Federalism, not unlike bicameralism, was designed to produce divided government and in the process create a series of checks on authority, ensure a diversity of representation and protect minority and sectional interests.

5 Tsebelis and Money qualify this broad statement by noting that the *Europa Yearbook* (1994) has only two minor exceptions to bicameral federations: the small Federated States of Micronesia and the United Arab Emirates (UAE) (1997, n8). Watts has reported that only two federal countries do not use bicameralism, though he identifies them as the UAE and Ethiopia (1996, 84). In table 1 we report five unicameral federal countries.

6 The United States is the primary outlier: representation in its senate is equal by states (two senators per state). Australia and Switzerland are also often described as having senates based on equality, but in practice they assign only half the seats to territories and half-cantons, respectively, that they do to states and cantons.

7 Symbolic representation is the meaning or symbolic value that a representative engenders among the group that identifies with the representative; while substantive representation requires the representative to take specific actions and to advocate on behalf of the group and in its interest (Pitkin 1967).

8 Upper chambers are almost universally smaller, with the average size of upper chambers being 83 members and most being no more than 50 members (Patterson and Mughan 1999, 4).

9 To ensure differentiation in representation and thereby strengthen the review function, many upper chambers have specific terms of office that are both longer than terms in the lower house and for a different time frame. The average term for upper chambers ranges from three to nine years, with two-thirds of all senators serving for five years or less, and often terms are staggered so one-third or one-half are selected at any time (Patterson and Mughan 1999, 5).

10 In addition to these six, mixed-member proportionality (MMP) has also been discussed in Canada at the provincial level. In MMP, two systems, such as plurality and proportional representation, or majority and proportional representation, are combined within a single legislative chamber. It would be unusual to adopt MMP for one of the chambers in a bicameral legislature (though it has been proposed for the House of Commons in the past); instead, the usual approach would be to adopt a different electoral system for each chamber. For a detailed examination of these and other electoral systems and voting mechanisms see Blais and Massicotte (2002); Norris (1997); Bogdanor and Butler (1983); and Lijphart and Grofman (1986).

11 This year was chosen as a start date because in the following year a constitutional crisis occurred in Australia when the Governor General dismissed the Labour government because of its inability to get supply (approval for its budgetary expenditures) through the Senate. The House of Representatives is the confidence chamber, and there are constitutional provisions for breaking deadlocks in Australia, so such a crisis is unlikely to occur in the future (Smiley 1985). However, Australian governments have found their budget process increasingly subject to the influence of the Senate with the increase in minority parties (Uhr 1999, 95-7).

12 The STV system in Australia elects few independents. This is, in part, because of a ballot that allows voters to select a political party rather than deciding between candidates.

13 In addition, there is a provision (now exercised on the advice of the prime minister) to allow the governor general to temporarily increase the number of senators by adding one or two senators to each region equally. This was a provision placed in the Constitution by the British to overcome any possible impasse between the Commons and the Senate.

14 Even at the time of Confederation Newfoundland was not expected to be included in the "Maritime division," and four additional seats were offered to this colony (Moore 1997). This was increased to six when the fourth "Western division" was created in the Senate by the *Constitution Act, 1915* (Hicks 2007). In addition to Newfoundland's six, the Yukon, Nunavut and Northwest Territories are each represented in the Senate by one member.

15 At the time of Confederation appointments were for life, but this was repealed and age 75 was set as the mandatory retirement age in the *Constitution Act, 1965*.

16 As noted earlier, Senate representation is based upon four regions of Canada: the Maritimes, Quebec, Ontario and the West. This legislation separates British Columbia from the Prairies as a fifth distinct region for the purposes of constitutional amendment. It is noteworthy that the Government of Canada had treated Canada as five distinct regions administratively for program delivery, regional directorates and ministerial office organization since the 1980s (Hicks 1990).

17 *Reference re Authority of Parliament in Relation to the Upper House*; alternately, *Re: Upper House*, [1980] 1 S.C.R. 54.

18 It was the opinion of the Standing Senate Committee on Legal and Constitutional Affairs (2007) that an 8-year term was insufficient to meet this constitutional test; it recommended a 15-year term and that the Bill be referred to the Supreme Court of Canada for a ruling on its constitutionality. The Bill had also allowed for renewable terms, but in response to the committee's suggestion that this might undermine the independence of the Senate if it remained an appointed, as opposed to an elected, body (as senators might wish to curry favour with the prime minister in order to get reappointed), the government made the terms non-renewable in Bill C-19.

19 The Prime Minister appointed a senator after the 2006 election, in spite of his commitment to leave all vacancies unfilled until there were elections, so as to satisfy the constitutional principle that cabinet ministers must be members of one of the two chambers of Parliament. Following the recent election, he ruminated publicly about filling vacancies with Conservatives if the Senate does not pass this reform legislation when the new Parliament convenes (Mayeda 2008).

20 This goes to the claim that the Bill was not in fact an election law but merely a mechanism by which the prime minister could, if he or she wished, seek the opinion of residents in a province before appointing someone to the Senate. See the evidence of Dan McDougall, Director of Operations (Democratic Reform) of the Privy Council Office (Legislative Committee on Bill C-20 2008a).

21 The chief electoral officer was empowered to enter into arrangements with the provincial election commissions and to alter the provisions of the Act to conform to provincial laws and regulations.

22 The limit of $150,000 on third-party spending during House of Commons elections was also tied to public financing of elections. Stephen Harper, when he was head of the National Citizens Coalition, had challenged the constitutionality of earlier limits in *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827.

23 There are a number of animations on the Web that are effective in illustrating how votes are distributed under STV. The Citizens' Assembly of British Columbia has one at http://www.citizensassembly.bc.ca/flash/bc-stv-count, explaining the system recommended for BC's legislature (STV was not adopted by the subsequent referendum). The state electoral office in South Australia has a series that explains different voting systems at http://www.seo.sa.gov.au/flash.htm

24 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 4-5.

25 Peter Hogg argues that the 1982 amending formulas have overtaken the *Re: Upper House* decision and should be treated as an explicit code governing future constitutional amendments (Special Senate Committee on Senate Reform 2006, 36-7). Monahan suggests that the applicable sections around the general amending formula constitute a codification of all matters that are of interest to the provinces in the wake of *Re: Upper House* (2002, 68).

26 Roger Gibbins has suggested that the threat of this legislation might create the "political dynamics that will enable us to carry the process forward" and force provinces like Quebec and Ontario to engage the federal government on its reform agenda – on its terms – including opening discussion over the number of senators each province has been assigned (Legislative Committee on Bill C-20 2008b, 1545). Certainly the threat of irreversible change to the Senate would encourage provinces to negotiate (and to mount legal challenges), but there is no reason to assume that it would cause these two provinces to reduce the number of senators that they are guaranteed if they do nothing. Quebec's minister of intergovernmental affairs has already made it clear that his province opposes direct election and would not agree to a smaller proportion of senators, citing Ontario's George Brown from the Confederation debates, who acknowledged: "Our Lower Canadian friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step and, for my part, I accept this in good faith" (Mar, Bountrogianni and Pelletier 2006, 14; also cited in *Reference re Authority of Parliament in Relation to the Upper House*; alternately, *Re: Upper House*, [1980] 1 S.C.R. 54). For its part, Ontario took the position in 2006 that it would want more seats, not fewer, in an elected Senate (Mar, Bountrogianni, and Pelletier 2006, 12). For a more detailed discussion on Senate numbers, and a possible solution, see Hicks (2007).

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Résumé

Restructuring the Canadian Senate through Elections

Bruce M. Hicks and André Blais

Avant sa dissolution, la 39e législature devait étudier deux textes de loi censés donner le coup d'envoi à une réforme du Sénat, à savoir les projets de loi C-19 (sur la durée du mandat des sénateurs) et C-20 (sur les consultations concernant la nomination des sénateurs). Ces deux lois combinées auraient transformé le Sénat actuel qui est, en vertu de la Constitution, une assemblée non élue dont les membres peuvent siéger jusqu'à 75 ans, en une assemblée dont les membres seraient élus pour un mandat de huit ans. Les élections seraient tenues à l'échelle des provinces selon une formule de représentation proportionnelle. Avec la réélection des conservateurs, ces questions sont restées à l'avant-plan. Le Sénat et plusieurs provinces, notamment le Québec, se sont objectés à ce que le gouvernement Harper mette en œuvre ces modifications sans que la Cour suprême ne se prononce sur la constitutionnalité des projets de loi. Le Québec a même menacé d'en référer à sa propre Cour d'appel. Si ces modifications proposées sont portées devant la Cour suprême, il sera très important pour celle-ci d'établir si elles changeraient la structure du Parlement canadien.

Pour examiner cette question, les auteurs de cette étude, Bruce Hicks et André Blais, se tournent vers d'autres pays dont la Chambre haute est soit nommée, soit élue, et ils analysent les différents systèmes électoraux envisagés pour le Sénat canadien. La recherche montre que les sénats élus sont mieux en mesure d'exercer l'ensemble de leurs pouvoirs. Ce qu'expliquerait en partie la perception publique de leur légitimité, qui serait renforcée selon les auteurs si des élections « consultatives » étaient tenues suivant les propositions du gouvernement. Autrement dit, le seul fait d'élire le Sénat influerait sur sa légitimité et ses pouvoirs.

Les auteurs soutiennent que l'intégration d'un ou deux sénateurs élus ne modifierait sans doute pas l'institution de manière fondamentale ou irréversible, mais que celle-ci serait éventuellement bel et bien transformée par une masse critique de sénateurs élus. À l'heure actuelle, 16 postes de sénateurs sont à pourvoir. Dès l'an prochain, le quart du Sénat pourrait être élu et plus de la moitié d'ici à 2014. On peut donc raisonnablement penser qu'il y aurait tôt ou tard un nombre suffisant de sénateurs élus pour inciter le Sénat à s'opposer régulièrement au gouvernement et à la Chambre des communes, de même qu'à établir une convention constitutionnelle prévoyant que toute future désignation au Sénat se fasse par voie de scrutin.

Sans compter que différents systèmes électoraux produiraient entre les partis un équilibre différent et une cohésion tout aussi variable au sein des partis. Plus les mécanismes servant à élire les chambres haute et basse varieraient, plus la représentation des partis serait diverse et plus les deux chambres pourraient prétendre représenter différentes dimensions de la société. Cela aurait aussi une incidence sur la légitimité et le degré d'indépendance dont jouiraient les sénateurs.

L'expérience australienne montre qu'une Chambre haute élue au scrutin à vote unique transférable, soit la formule de représentation proportionnelle préconisée par le gouvernement canadien, renverrait certains petits partis à une seconde chambre. Mais contrairement à l'Australie, le Canada élit déjà quatre ou cinq partis politiques à la Chambre des communes.

L'élection du Sénat modifierait aussi la nature de la représentation. Le Sénat actuel a été nommé en vue de représenter des intérêts régionaux et sectoriels, la minorité anglophone du Québec par exemple. Or, bien que la représentation proportionnelle soit conçue pour assurer la diversité d'une assemblée législative, elle le fait par voie de représentation politique et non en représentant les minorités culturelles.

Le mode de scrutin à vote unique transférable s'appliquerait aussi différemment dans chaque province selon les dimensions de celle-ci et le nombre de sièges en jeu. La Constitution n'ayant pas été modifiée, le nombre de sénateurs auquel chaque province a droit resterait le même. C'est donc dire qu'il pourrait y avoir jusqu'à 12 sièges et plus en jeu dans les grandes provinces comme l'Ontario, et que les candidats qui se présentent à l'élection dans cette province pourraient dépenser chacun jusqu'à 8,5 millions de dollars pour atteindre un quota de suffrages aussi bas que 435 000. On notera que ces questions pratiques n'ont fait l'objet jusqu'à présent d'aucun véritable débat.

Si les auteurs examinent en détail les répercussions sur le Sénat de l'élection de ses membres, ils ne formulent aucune recommandation quant à l'adoption des propositions. En fait, ils notent que l'expérience comparative montre que le système préconisé par le gouvernement est fidèle à la configuration des chambres hautes d'autres pays. De telles modifications changeraient toutefois la structure du Parlement et le rapport entre les assemblées législatives haute et basse. Aussi jugent-ils important que les Canadiens entament un dialogue sur le rôle qu'ils souhaitent confier à leur Chambre haute et sur le système électoral le mieux en mesure d'incarner leurs valeurs fondamentales.

Summary

Before it was dissolved, the 39th Parliament had two pieces of legislation (C-19, *Senate Tenure*, and C-20, *Senate Appointment Consultations Act*) before it that were supposed to jump-start Senate reform. Together, they would have transformed the existing Senate, an appointed chamber where senators can serve until age 75, into a body where senators were chosen by proportional representation in province-wide elections for eight-year terms. With the re-election of the Conservatives, these issues remain salient.

The current Senate and several provinces, notably Quebec, have objected to the Harper government proceeding with these changes without first obtaining a ruling from the Supreme Court on whether or not these pieces of legislation are constitutional. Quebec has even threatened to go to the Quebec Court of Appeal on its own. If these proposed changes were brought before the Supreme Court, a central consideration of the court would be whether or not they would structurally alter the Canadian Parliament.

To examine this question, Bruce Hicks and André Blais, the authors of this study, look at other countries' experiences with appointed and elected upper chambers and at the various electoral systems that have been discussed as possibilities for the Canadian Senate. Evidence shows that elected second chambers are more likely to exercise the full range of their powers. This is based, in part, the authors explain, on the public perception of legitimacy, which they conclude would increase if consultative elections were held as per the government's proposals. In other words, the very act of electing the chamber would have a transformative effect on its legitimacy and powers.

The authors argue that while the introduction of one or two elected senators might not alter the institution fundamentally or irreversibly, eventually there would be a critical mass of elected senators, which would transform the chamber. There are currently 16 vacancies. Under the proposed system, by next year, one-quarter of the Senate might be elected and by 2014 over half. It is reasonable to expect that at some point there would be a sufficient number of elected senators to encourage the Senate to routinely oppose the government and the House of Commons, and to establish a constitutional convention that all future appointments to the Senate would have to be made by election.

Moreover, different electoral systems would result in a different balance between the parties and different degrees of party cohesion. The more the electoral mechanisms used to elect the upper and the lower chambers differed, the more diverse the representation would be in terms of political parties and the more these bodies would claim to represent different dimensions of society. This would also have an impact on the legitimacy and the degree of independence that senators enjoyed.

The Australian experience shows that an upper chamber elected using single transferable voting, the form of proportional representation advocated by the Canadian government, would return a number of smaller parties to the second chamber. Yet unlike Australia, Canada already elects between four and five political parties to the House of Commons.

Election also changes the nature of representation. The current Senate was designed to represent regional and sectional interests, such as the anglophone minority in Quebec. While proportional representation is designed to ensure diversity within a legislature, it does this by ensuring political, not cultural minority, representation.

Single transferable balloting would also operate differently in each province based on the size of the province and the number of Senate seats being contested. Since the Constitution would not be altered, the number of senators to which each province is entitled would remain as currently prescribed. This means that the number of Senate seats being contested in a large province like Ontario could be 12 or more, and candidates running for election in that province could be allowed to spend as much as $8.5 million dollars in order to win a threshold of votes as low as 435,000, a practical consideration that has not been widely discussed.

While Blais and Hicks examine in detail the implications of election on the Senate, they make no recommendation as to whether the proposals should be adopted. In fact, they note that comparative experience shows that the system advocated by the government is in keeping with the configuration of upper chambers in other countries. However, such changes would structurally alter Parliament and change the relationship between the upper and the lower legislative chambers. It is therefore important, the authors maintain, that Canadians engage in a dialogue over what role they desire for their upper chamber and what electoral system best represents their core values.